

Commercial trading: standard terms of purchase

INTRODUCTION

Many businesses will have standard terms of sale applicable to their own sales, but it can also be useful to have your own standard terms of purchase which apply to your procurement arrangements. Your standard purchase terms are likely to be a lot more favourable to you than the sales terms of your suppliers. Using standard purchase terms will also create contractual certainty and may be particularly important if you are on-supplying to customers.

Smaller businesses will wish to consider whether they can realistically impose standard terms of purchase on their suppliers.

This guide considers some of the most important areas to include in standard terms of purchase. If, having considered this guide, you would like to know more or to discuss your own circumstances in greater detail, please speak to your usual contact at Stevens & Bolton or a contact listed at the end of this guide.

WHAT TERMS SHOULD I INCLUDE IN STANDARD TERMS OF PURCHASE?

Many of the issues addressed in your standard terms of purchase will be similar to those addressed in standard terms of sale, but the position taken in respect of each issue may be different. Ultimately the content of any standard purchase terms will depend on the nature of goods or services procured and the way in which your business operates.

Price and Payment

It is important to make it clear what the charges cover. For example, will this include VAT, packaging costs, shipping and delivery, import or export costs, insurance, expenses incurred by the supplier etc.

It is also important to specify the timings for payment. If you have any particular invoicing requirements these should be included in your standard purchase terms, for example when can the supplier invoice and is a purchase order number required? Consider whether payment should be contingent, for example, on the achievement of a particular milestone or your acceptance of the goods or services supplied.

Other provisions you may wish to include in your standard purchase terms include a right of set off or the right to withhold payment of disputed invoices, restrictions against increasing fees without your consent, a statement that time of payment is not of the essence (so the supplier does not have the right to terminate immediately if you are late with payments).

Transfer of Risk and Ownership

If you are purchasing goods, you may want to assume the risk in those goods as late as possible (e.g. on the *later* of payment or delivery) but to acquire ownership ("title") as early as possible (e.g. on the *earlier* of payment or delivery). This ensures that the supplier is responsible, for example, for any damage to or loss of the goods during delivery.

Warranties

To provide protection in the event that you are supplied with goods or services that are sub-standard, standard purchase terms can include warranties which guarantee the quality of the goods or services supplied. For example, include a warranty that:

- the goods or services will correspond to their description (including any agreed service levels).
- the goods or services will be supplied in compliance with applicable regulations and best industry practice.
- the supplier's staff will be suitably qualified and will use reasonable skill and care in supplying the goods or services.
- your use of the goods or services will not infringe any third party intellectual party rights .

Purchase terms should also address the duration of any warranties provided, and the consequences of a breach of warranty, for example by including the right to a refund of fees and/or replacement of defective goods or re-performance of the defective services?

Limits on Liability and Insurance

Avoid including any provisions which exclude, cap or otherwise limit the supplier's liability under the contract. If the supplier's liability is limited in any way, ensure that this is not to an extent that will prevent you from recovering the type and amount of loss which you are likely to incur in the event of the supplier's breach, for example will loss of profits be recoverable?

If the customer's only liability under the supply arrangement is to pay for the goods or services supplied, then purchase terms may not need to limit your liability as customer. However, you should consider carefully whether you may incur other liability, for example if you are supplying equipment or tooling to the supplier in connection with the contract for goods or services or if the supplier is carrying out its services at your premises. In such cases it may be appropriate to include provisions in your standard purchase terms which limit your liability in these respects. See our separate guide "Guidance on Standard Terms of Sale" for more discussion of limiting of liability.

Consider the types and levels of insurance which the supplier should have in place. If appropriate you may wish to include an obligation on the supplier to note your name on any insurance policy.

Governing Law and Jurisdiction

Standard terms of purchase should state the law which will govern their operation (e.g. English law) and also the jurisdiction for any disputes which may arise out of the terms (e.g. English courts). You may also wish to specify any more informal dispute escalation and resolution procedures which should be followed in the event a dispute does arise.

HOW DO I MAKE SURE THAT MY STANDARD TERMS OF PURCHASE ARE INCORPORATED INTO ALL MY SUPPLY CONTRACTS?

Your standard terms of purchase will only be effective if properly incorporated into your purchase contracts and often suppliers will seek to exclude the application of your purchase terms in favour of their own sales terms. To incorporate your standard purchase terms you need to present them before the contract has already been made. This is helped by referencing to your standard purchase terms from an early stage in the contracting process, for example in any pre-contractual communication, any purchase order or other document requesting goods or services or any statement of work prepared by you. Imposing standard terms of purchase may of course be difficult to achieve for online website purchases.

In practice, you should ensure that you have proper contracting policies and procedures in place which ensure effective incorporation of your standard terms. Your staff should be aware of the importance of following these policies and procedures and forwarding your standard terms to suppliers. If at any point you change or update your standard terms of purchase, the new terms should be sent out to all suppliers under existing contracts, and if the terms are on your website this should also be updated.

If your standard terms of purchase are not incorporated, then they are of no legal effect - simply sending them after the event or on breach is unlikely to be enough. If you are not able to impose your terms of purchase on a supplier, then its terms of sale may apply in conjunction with any other terms implied by law which cannot be or have not been excluded.

CONTACT US

For further information about any of the issues raised in this guide, please contact:



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The information contained in this guide is intended to be a general introductory summary of the subject matters covered only. It does not purport to be exhaustive, or to provide legal advice, and should not be used as a substitute for such advice.

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